SERVED: May 12, 1993

NTSB Order No. EA-3877

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of April, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. FRANK WAYNE SUE, Respondent.	Docket SE-11100

OPINION AND ORDER

Both the respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on December 12, 1990, following an evidentiary hearing.[1] The law judge, modifying an order of the Administrator seeking to revoke respondent's commercial pilot and medical certificates, ordered the commercial pilot certificate suspended

[1]The initial decision, an excerpt from the hearing transcript, is attached.

for 11 months. We grant the Administrator's appeal and deny that of respondent.

The Administrator's order of revocation charged respondent with violations of 14 C.F.R. 61.3(a) and (c), 67.20(a)(1), 91.27(a)(2), 91.79(c), and 91.9.[2] All but the § 67.20(a)(1)

[2]§ 61.3(a) and (c) read:

(a) Pilot certificate. No person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part. . . .
* * * * *

(c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter. . . .

§ 67.20(a)(1) provides:

(a) No person may make or cause to be made--

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part[.]

§ 91.27(a)(2) (now 91.203(a)(2)) requires:

(a) Except as provided in § 91.715, no person may operate a civil aircraft unless it has within it the following:

(2) An effective U.S. registration certificate issued to its owner or, for operation within the United States, the second duplicate copy (pink) of the Aircraft Registration Application as provided for in § 47.31(b), or a registration certificate issued under the laws of a foreign country.

§ 91.79(c), Minimum safe altitudes; General. (now 91.119(c)) read:

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(c) Over other than congested areas. An altitude of 500

allegation stemmed from events on September 4, 1989, when respondent was pilot in command of a Republic Sea Bee on flights in the vicinity of Lake Oroville, CA. The Administrator alleged and the law judge found that, not only did respondent operate the aircraft without his pilot and medical certificates and aircraft registration (findings respondent does not contest on appeal), he flew the aircraft under and too close to a bridge, violating §§ 91.79(c) and 91.9. The Administrator also alleged, and the law judge found, that respondent violated § 67.20(a)(1) in failing to report on his 1987-1989 medical applications various driving-while-intoxicated convictions.

Respondent argues numerous errors in the law judge's finding of intentional falsification under § 67.20. We agree with respondent that a finding of violation requires actual knowledge of the false statement, and that it is not enough that a respondent should have known that an entry was false. We disagree, however, with respondent's argument that the law judge here applied that wrong standard. Although his ultimate conclusion could have been more precise and his analysis can be read to misstate the law by suggesting that intent could be shown by what a respondent should have known, it is clear that the law

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> feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.9 (now 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

judge did not base his decision on any mistaken view of the required proof for an intentional falsification, for he unequivocally found that respondent's false answer was knowingly entered. See Tr. at 185, lines 5-7 ("was it made knowingly . . . with knowledge of its falsity") and lines 18-21 ("I think he did know . . . that what they were asking on the form he should have said yes to."). Therefore, we do not agree with the Administrator's apparent concession that the case should be remanded for clarification on this point.[3]

We also affirm the law judge's finding that the Administrator met his burden of proof on the falsification charge, and thereby reject respondent's contention that there was no evidence that respondent had actual knowledge that his statements were false. Respondent testified that he had read the form. Tr. at 147. In fact, in response to the law judge's questioning, respondent acknowledged that he had looked at the form to see the questions that were being asked, that he had read the question asking for traffic conviction information, and that he "just didn't feel it was pertinent." Tr. at 159-160. With this testimony, the law judge had sufficient evidence to uphold this count of the complaint.

Respondent also argues, in connection with the § 67.20

[3]Arguably, the law judge was not suggesting that it would be enough that the respondent should have known that his answer was false but, rather, was expressing his view that the respondent should have understood, given his "background and experience," that a truthful answer required an affirmative response on the application.

finding, that the medical application is too vague to support a finding of intentional falsification and that the questions regarding traffic or other convictions exceed the Administrator's legitimate interest. In support, respondent claims that the FAA has admitted the form to be vague and notes that a U.S. District Court has so held (United States v. Manapat, Case No. 88-325-Cr-T-13(A) (U.S.D.C. Middle District of Florida, Tampa Division, December 12, 1988)).

We have already dismissed the Administrator's motion, predicated on Manapat, for expedited review. NTSB Order EA-3430 (1991). In that order, we addressed in detail the subsequent decision on review by the Court of Appeals in United States v. Manapat, 928 F.2d 1097 (11th Cir. 1991). We there determined that Manapat is not controlling and does not require a finding that the medical application was vague.[4] We also specifically found that, despite their placement under the heading "Medical History," the two questions about traffic and other convictions are not confusing to a person of ordinary intelligence. We especially noted that the key questions determinative of whether an application was vague as applied -- respondent's knowledge and intent -- would be determined by the law judge after hearing.

Moreover, it is not our role to second-guess the FAA's

[4]Similarly, an internal memo written by an FAA employee not clearly authorized to speak on the matter on behalf of the Administrator also does not compel a conclusion in respondent's favor. Furthermore, it is unclear how the memo got into the record in Manapat, this memo is not in evidence in this case, and it does not appear that the FAA has adopted its discussion either here or in Manapat.

policy choices in the questions asked in the medical application. Administrator v. Ewing, 1 NTSB 1192, 1194 (1971). It is also a general rule of administrative law that agency rule changes will not be taken as admissions against interest (or taken as evidence that the prior rule was unlawful in any respect), as doing so would create an undesirable deterrent against beneficial rule changes.

Respondent also argues that the remaining charges were not supported with substantial evidence. These issues are not dispositive because, as discussed below, the intentional falsification violation, standing alone, supports revocation of respondent's commercial pilot and medical certificates. Nevertheless, we respond that, in the main, respondent's objections to the initial decision challenge the law judge's credibility findings, yet respondent does not demonstrate that those findings are reversible as arbitrary or capricious.[5]

We also agree with the law judge's analysis of the dangers of flying below the bridge. That no accident occurred is not the test of whether 91.9 was violated. Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1157 (10th Cir. 1986), cert. den'd, 486 U.S. 1006 (1988).[6]

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[5]And, although respondent claims that his actions were necessary for landing because the alternative routes available to him were more hazardous, he offers no reason why the law judge's resolution of the conflicting evidence on this point must be reversed.

[6]Respondent suggests that the initial decision is illogical because, had he "step-taxied" across the water, he would not have violated any rules. Respondent does not explain the basis for or

The Administrator's appeal seeks review of the law judge's failure to revoke respondent's commercial pilot certificate and failure to take any action against respondent's medical certificate. We agree with the Administrator's review of precedent. In the circumstances, revocation of both the operating and medical certificate is available. Administrator v. Barron, 5 NTSB 256 (1985). It was error for the law judge to amend the sanction absent clear and compelling evidence. Administrator v. Muzquiz, 2 NTSB 1474 (1975). Such evidence was not identified by the law judge.[7] Not only is the sanction here in accord with precedent, no mitigating circumstances peculiar to respondent were found by the law judge or are apparent to us.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted; and

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offer case support for this statement and we see neither.

[7]Respondent argues, in reply, that the Board has exercised discretion in the past and not affirmed revocation in every case of intentional falsification. Respondent, however, offers no examples of such cases, nor does he show similarity of circumstances with any such prior cases.

Respondent later acknowledges that revocation is available where lack of qualification is alleged, and suggests that proof of an intent to defraud is necessary to prove lack of qualification. Precedent does not support this contention. See, e.g., Administrator v. Rea, NTSB Order EA-3467 (1991) (intentional falsification of application is a serious offense which in virtually all cases the Administrator imposes and the board affirms revocation, citing Administrator v. Cassis, 4 NTSB 555 (1982), reconsideration denied, 4 NTSB 562 (1983), aff'd Cassis v. Helms, Admr., FAA, et al, 737 F.2d 545 (6th Cir. 1984)).

3. The revocation of respondent's commercial pilot and medical certificates shall begin 30 days from the date of service of this order.[8]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[8]For the purposes of this order, respondent must physically surrender his certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).